

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Annual Assessment of the Status of
 Competition in Markets for the Delivery
 of Video Programming

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CS Docket No. 97-141

Directed to: The Commission

**REPLY COMMENTS OF BELL SOUTH CORPORATION,
 BELL SOUTH INTERACTIVE MEDIA SERVICES, INC. AND
 BELL SOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and its subsidiaries BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby file their reply comments with respect to the FCC's *Notice of Inquiry* (the "*NOI*") in the above-captioned proceeding.

In its initial comments BellSouth urged the Commission to close loopholes in its program access rules and thereby ensure the full and fair competition to incumbent cable operators that Congress intended to promote in the 1992 Cable Act and the Telecommunications Act of 1996. In particular, BellSouth pointed out that the confluence of increased cable industry consolidation and the introduction of more widespread competition between various types of multichannel video programming distributors ("MVPDs") will render new MVPD competitors even more

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vulnerable to anticompetitive cable industry practices, and thus new MVPD competitors require even more vigorous FCC oversight of program access issues.

It is no coincidence that cable's most substantial existing and potential competitors have requested similar relief both in this proceeding and before Congress. For example, Bell Atlantic and Ameritech, who are providing "hardwire" competition to incumbent cable operators, have documented their difficulties in obtaining programming and, like BellSouth, have asked the Commission to do whatever is necessary to expand the program access rules to encompass *all* programmers regardless of whether they are vertically-integrated or use satellite technology to delivery their product.^{1/} DIRECTV, which currently provides DBS service to more than 2.6 million subscribers nationwide, has noted that increased consolidation within the cable industry "raises vast opportunities for anticompetitive harm to the MVPD industry," and has urged the FCC to alleviate the problem by closing the program access loopholes discussed above.^{2/} The Wireless Cable Association International, Inc. ("WCA") has described in detail why current

^{1/} See, Comments of Bell Atlantic and NYNEX, CS Docket No. 97-141, at 6-7 (filed July 23, 1997); Comments of Ameritech New Media, Inc., CS Docket No. 97-141, at 14-18 (filed July 23, 1997); Comments of the United States Telephone Association, CS Docket No. 97-141, at 7-8 (July 23, 1997). Also, like BellSouth, a number of competing MVPDs have expressed support for Ameritech's pending Petition for Rulemaking on program access (RM-9097) or otherwise urged the Commission to amend its procedures for resolving program access complaints. See, BellSouth Comments at 16; Comments of The National Rural Telecommunications Cooperative, CS Docket No. 97-141, at 10-12 (filed July 23, 1997); Comments of The Wireless Cable Association International, Inc., CS Docket No. 97-141, at 12, n.41 (filed July 23, 1997) [the "WCA Comments"]; Comments of Optel, Inc., CS Docket No. 97-141, at 5-6 (filed July 23, 1997).

^{2/} Comments of DIRECTV, Inc., CS Docket No. 97-141, at 4-6 (filed July 23, 1997). See also, Comments of Echostar Communications Corporation, CS Docket No. 97-141, at 16-17 (filed July 23, 1997).

market conditions militate against full and fair access to programming for all MVPDs, and has asked for modifications of the 1992 Cable Act to address the problems described by BellSouth and others.^{3/}

Moreover, cable's competitors have taken their case directly to Capitol Hill, and as a result key members of Congress are considering whether to introduce legislation to close the program access loopholes left open by the 1992 Cable Act.^{4/} Indeed, the Chairman of the House Telecommunications Subcommittee, Rep. Billy Tauzin, has acknowledged that "[h]e who owns the programming [rules] the marketplace,"^{5/} and has indicated that the Subcommittee will soon begin new proceedings to investigate whether Congress should amend the 1992 Cable Act to address the problems cited above.^{6/} In other words, Congress is beginning to recognize what cable's competitors have known for some time: given recent marketplace and technological developments, the current regulatory framework for program access is in serious danger of

^{3/} WCA Comments at 3-14.

^{4/} By way of example, attached hereto as Exhibit 1 is the Testimony of William F. Reddersen, Group President - Long Distance & Video Services, BellSouth Enterprises, before House Telecommunications Subcommittee on July 29, 1997. Therein Mr. Reddersen describes BellSouth's substantial investments towards providing MVPD competition using wireless and wired technologies, and how the current loopholes in the program access statute place alternative MVPDs at a decided disadvantage vis-a-vis incumbent cable operators. *See also*, Hearn, "Program Access Focus of House Hearing," *Multichannel News*, pp. 1, 55 (Aug. 4, 1997) [describing similar testimony by Deborah Lenart, President of Ameritech New Media, Inc.].

^{5/} Glick, "Tauzin Concerned About Cable Competition, Program Exclusivity," *Cable World*, at 1, 43 (Jul. 7, 1997).

^{6/} Glick, "Will Congress Revamp Program-Access Rules," *Cable World*, p.12 (Aug. 4, 1997).

becoming obsolete unless loopholes in the current program access rules are closed as soon as possible.

Notwithstanding the above, Home Box Office, Inc. ("HBO") insists that the FCC's program access rules have achieved their objective and thus are no longer necessary. In support, however, HBO offers only scant evidence that this is in fact the case. Specifically, HBO only cites (1) the fact that HBO itself sells programming to non-cable MVPDs; (2) that "very few complaints have been filed seeking access to vertically-integrated programming and even fewer have been decided against the programmer"; and (3) the channel lineups of three DBS operators, one wireless cable operator, one cable overbuilder, one OVS system and one LMDS system.⁷¹

While BellSouth commends HBO for its efforts to sell its programming to non-cable MVPDs, BellSouth respectfully submits that HBO misses the point: the number of program access complaints filed at the Commission is attributable to the fact that the program access statute specifically *excludes* a significant portion of the programming universe, *i.e.*, nonvertically-integrated programmers. Thus it makes little sense for HBO to suggest that the relatively small number of program access complaints filed with the FCC means that the rules have outlived their purpose. To the contrary, the small number of complaints reflects that the

⁷¹ Comments of Home Box Office, Inc., CS Docket No. 97-141, at pp. 3-9, Attachment 1 (filed July 23, 1997).

rules *are not broad enough*, and thus must be expanded to redress the anticompetitive behavior which has now been well documented before the Commission and Congress.^{8/}

Indeed, the recent Petition for Exclusivity filed by the Outdoor Life and Speedvision cable networks (CSR-5044-P) demonstrates the inaccuracy of HBO's analysis. Outdoor Life and Speedvision have asked the FCC for authority to enter into exclusive contracts with incumbent cable operators against non-cable, non-^{9/}DBS MVPDs for a period of up to four years in 17 of the largest DMAs in the United States, plus the entire State of Connecticut. In essence, the Networks are arguing that cable operators, by virtue of their stranglehold over local distribution, are intimidating start-up, vertically-integrated cable networks into offering exclusivity against cable's competitors. As already noted by the alternative MVPDs cited above, this already is the case with respect to nonvertically-integrated programmers, and thus the Networks' Petition, if granted, will further encourage the very same anticompetitive conduct which Congress sought to prevent in the 1992 Cable Act. Accordingly, as more fully explained in BellSouth's Opposition to the Petition, BellSouth submits that the fairest solution to the problem is for the Commission to amend its rules or request changes to the 1992 Cable Act that would extend the prohibition on exclusivity to *all* programmers and thereby create a *bona fide* level playing field

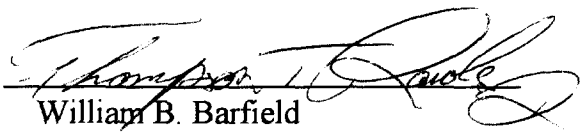
^{8/} BellSouth further submits that HBO's extremely limited random sample of alternative MVPD channel lineups hardly constitutes the comprehensive study necessary to sustain its argument, particularly in light of the other evidence in this proceeding indicating that HBO's conclusions about program access are wrong. Finally, though HBO asserts that the FCC's current program access rules impose "significant costs," it does not offer any examples of whether and/or how those costs have imposed any material economic burdens on programmers.

^{9/} See, Opposition of BellSouth Corporation, *et al.*, CSR-5044-P (filed Aug. 18, 1997).

for new cable networks and cable's competitors alike. That is the only result truly consistent with Congressional intent.

Respectfully submitted,

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August 20, 1997

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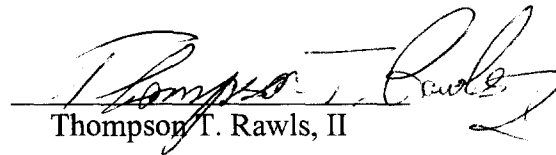
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EXHIBIT 1

Statement of

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GROUP PRESIDENT - LONG DISTANCE & VIDEO SERVICES

BELLSOUTH ENTERPRISES

Before the

SUBCOMMITTEE ON TELECOMMUNICATIONS, TRADE AND CONSUMER
PROTECTION

of the

COMMITTEE ON COMMERCE

U.S. HOUSE OF REPRESENTATIVES

July 29, 1997

GOOD MORNING. I WANT TO START, MR. CHAIRMAN, BY THANKING YOU FOR THIS OPPORTUNITY. WE AT BELLSOUTH HAVE ALREADY PURCHASED THE RIGHTS TO SERVE SOME 4 MILLION POTENTIAL CUSTOMERS WITH WIRELESS TV SERVICE, WHICH WE WILL COMPLEMENT IN SELECTED AREAS BY WIRED CABLE. OUR OBJECTIVE IS TO BRING VIDEO CHOICE TO MILLIONS OF CONSUMERS.

OUR FIRST WIRELESS LAUNCH, MR. CHAIRMAN, IS CURRENTLY PLANNED FOR NEW ORLEANS LATE THIS YEAR AND I HOPE YOU WILL BE ABLE TO JOIN US FOR THAT OCCASION, IF YOUR SCHEDULE PERMITS.

YOU HAVE CALLED THIS HEARING TO FOCUS ON WHAT ELSE NEEDS TO BE DONE TO ENCOURAGE VIDEO COMPETITION. I SUBMIT TO YOU THAT THE BEST WAY TO ENSURE VIDEO COMPETITION TODAY IS TO STRENGTHEN A FUNDAMENTAL PRINCIPLE YOU ESTABLISHED IN THE 1992 ACT: THAT IS, OPEN ACCESS TO PROGRAMMING ON EQUAL TERMS AND CONDITIONS. WITHOUT ANY DOUBT, OPEN ACCESS TO PROGRAMMING ON NONDISCRIMINATORY TERMS IS THE NUMBER ONE RISK TO ANYONE PLANNING OR IMPLEMENTING COMPETITION TO CABLE. TECHNOLOGY, SALES AND SERVICE CAN ALL BE MANAGED. BUT, WITHOUT OPEN ACCESS TO PROGRAMMING THERE IS NO SERVICE. FOR THESE REASONS,

PROGRAMMING ACCESS REFORM IS THE NUMBER ONE LEGISLATIVE PRIORITY FOR BELLSOUTH'S VIDEO BUSINESS. LET ME EXPLAIN.

THE TELECOMMUNICATIONS ACT OF 1996, PASSED THROUGH YOUR LEADERSHIP, IS DESIGNED TO OPEN BOTH TELEPHONE AND CABLE MARKETS. THE 96 ACT RELIES HEAVILY ON MANDATORY RESALE AND EQUAL INTERCONNECTION OF LOCAL TELEPHONE NETWORKS TO ACCELERATE ECONOMIC ENTRY BY TELEPHONE COMPETITORS. HOWEVER, THERE ARE NO COMPARABLE PROVISIONS TO LOWER THE INVESTMENT LEVELS FOR NEW VIDEO COMPETITORS.

ENTRY INTO CABLE MARKETS, WHETHER AS A FRANCHISED CABLE OPERATOR, AS A WIRELESS CABLE OPERATOR, OR AS A SATELLITE SERVICE PROVIDER, REQUIRES A LARGE UPFRONT INVESTMENT IN AN ALTERNATIVE DISTRIBUTION NETWORK.

BELLSOUTH HAS COMMITTED TO INVEST MILLIONS OF DOLLARS TO BRING MILLIONS OF CONSUMERS A COMPETITIVE CHOICE OF VIDEO SERVICES. THE SUCCESS OF THAT INVESTMENT DEPENDS IN VERY LARGE PART ON OPEN ACCESS TO PROGRAMMING. FROM THE CUSTOMERS' POINT OF VIEW, WHICH ULTIMATELY IS THE ONLY ONE THAT COUNTS, THE VIDEO BUSINESS IS ACCESS TO PROGRAMMING AT COMPETITIVE PRICES. YOU CAN BUILD THE BEST NETWORKS IN THE WORLD, BUT IF YOU DON'T

HAVE THE RIGHT PROGRAMMING, YOU WILL FAIL, YOUR INVESTMENT WILL BE WORTHLESS, AND CONSUMERS WILL LOSE.

SINCE 1992, A NUMBER OF DISTURBING TRENDS AFFECTING PROGRAMMING ACCESS HAVE ARISEN THAT ARE OF SERIOUS CONCERN TO POTENTIAL COMPETITORS. I WOULD ASK YOU TO STOP THESE TRENDS NOW BEFORE THEY BECOME MAJOR BARRIERS TO COMPETITION.

THE FIRST TREND IS THE EMERGENCE OF EXCLUSIVE PROGRAMMING DEALS BETWEEN INCUMBENT CABLE OPERATORS AND PROGRAMMERS NOT CURRENTLY SUBJECT TO THE PROGRAMMING ACCESS RULES. THE CONTINUED CONSOLIDATION OF CABLE HOUSEHOLDS DEMANDS MORE OPEN PROGRAMMING ACCESS THAN WAS REQUIRED IN 1992.

PROGRAMMERS, REGARDLESS OF THEIR AFFILIATION, ARE INCREASINGLY DEPENDENT FOR CARRIAGE ON THESE VERY LARGE INCUMBENT OPERATORS. ALL PROGRAMMERS MUST HAVE ACCESS TO A SUFFICIENT NUMBER OF HOUSEHOLDS TO SUPPORT THE INTRODUCTION AND SUCCESS OF THEIR PROGRAMMING AND CABLE OPERATORS USE THIS TO THEIR ADVANTAGE.

THESE FACTS CREATE AN ENVIRONMENT WHICH STIMULATES EXCLUSIVE DEALS. EXCLUSIVITY, WHICH LIMITS ACCESS BY NEW ENTRANTS, IS A SMALL PRICE PROGRAMMERS ARE EITHER WILLING OR FORCED TO PAY

FOR CARRIAGE. SINCE NEW ENTRANTS HAVE YET TO ESTABLISH A SUBSTANTIAL CUSTOMER BASE, THEY ARE LEFT TOTALLY VULNERABLE. EXAMPLES OF SUCH EXCLUSIVE DEALS INCLUDE TV LAND (OWNED BY VIACOM), FX AND FOX NEWS (OWNED BY NEWS CORP.), MSNBC (OWNED BY NBC AND MICROSOFT) AND EYE ON PEOPLE (OWNED BY CBS).

SECOND - SOME CABLE COMPANIES APPEAR TO BE USING ALTERNATIVE DELIVERY TECHNOLOGIES OTHER THAN SATELLITES, SUCH AS FIBER AND MICROWAVE. ONE EFFECT OF SUCH APPROACHES IS TO AVOID OPEN PROGRAM ACCESS REQUIREMENTS. BELLSOUTH HAS ALREADY ENCOUNTERED THIS PROBLEM IN NEW ORLEANS AND ORLANDO AND IT HAS BEEN RECENTLY REPORTED IN THE PRESS THAT CABLEVISION AND COMCAST WERE PLANNING A SIMILAR MOVE TO DISTRIBUTE POPULAR SPORTS PROGRAMMING ON AN EXCLUSIVE BASIS IN NEW YORK AND PHILADELPHIA.

THIRD - SOME LOCAL BROADCASTERS HAVE DEMANDED THAT NEW ENTRANTS CARRY OTHER AFFILIATED PROGRAMMING AS A CONDITION OF GRANTING RETRANSMISSION CONSENT FOR THEIR LOCAL STATION. NBC AND CNBC IS JUST ONE EXAMPLE OF THIS.

THESE LOOP HOLES IN THE PROGRAMMING ACCESS RULES CAN BE PLUGGED WITH TWO SIMPLE CHANGES TO TODAY'S RULES:

FIRST, CONGRESS CAN EXTEND THE EXISTING RULES TO ALL PROGRAMMERS AND BROADCAST STATIONS, REGARDLESS OF WHETHER THEY ARE VERTICALLY INTEGRATED OR REGARDLESS OF HOW THEY ARE DELIVERED.

SECOND, YOU CAN PROHIBIT CABLE PROGRAMMERS AND TELEVISION STATIONS FROM REQUIRING A FORCED BUNDLING OF MULTIPLE PROGRAMS AS A CONDITION OF GRANTING RETRANSMISSION CONSENT OR HAVING ACCESS TO POPULAR PROGRAMMING.

YOU SAW THIS LACK OF PROGRAMMING ACCESS LIMIT THE EVOLUTION OF SATELLITE AND WIRELESS VIDEO SERVICES FOR YEARS. YOU ALSO SAW A RECENT EXAMPLE OF THE TREMENDOUS ECONOMIC PRESSURE THE CABLE INDUSTRY WIELDS OVER NONAFFILIATED PROGRAMMERS WHEN MR. MURDOCH ABANDONED HIS PLANS TO BUILD AN ALTERNATIVE VIDEO DELIVERY SYSTEM IN FAVOR OF A CABLE PARTNERSHIP.

YOU MAY NOT BE ABLE TO UNBUNDLE CABLE FACILITIES TO STIMULATE COMPETITION AS IN THE TELEPHONY WORLD BUT YOU CAN ENSURE OPEN ACCESS TO PROGRAMMING.

IN SUMMARY, I WOULD SAY THAT THE CABLE INDUSTRY CLEARLY KNOWS THAT THEIR CUSTOMER SERVICE, AND THEIR PRICES ARE NOT SUFFICIENT WEAPONS TO BLOCK COMPETITIVE ENTRY. WHEN THEY SAY LET "OPEN" MARKETS TAKE CARE OF THE PROGRAMMING EXCLUSIVITY ISSUE, WHAT THEY ARE REALLY SAYING IS LET US USE PROGRAMMING EXCLUSIVITY AS THE WEAPON TO ENSURE A CLOSED MARKET.

MR. CHAIRMAN, OPEN ACCESS TO PROGRAMMING IS THE FUNDAMENTAL PREREQUISITE TO ENSURE THAT CUSTOMERS ALWAYS WIN.

THANK YOU.